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Nos. 03-1116, -1120 and -1274

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM,
GOVERNOR OF MICHIGAN, *et al.*, *Petitioners*,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,
v.
ELEANOR HEALD, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

JUANITA SWEDENBURG, *et al.*, *Petitioners*,
v.
EDWARD D. KELLY, CHAIRMAN,
NEW YORK DIVISION OF ALCOHOLIC BEVERAGE CONTROL,
STATE LIQUOR AUTHORITY, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF ILLINOIS ALCOHOLISM AND DRUG DEPENDENCE ASSOCIATION IN SUPPORT OF PETITIONERS IN *GRANHOLM* AND RESPONDENTS IN *SWEDENBURG*

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the 21st Amendment?

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CONSENT TO FILE

Consents to the filing of any *amicus* briefs in each of the consolidated cases were filed by the parties on July 9, 2004, July 13, 2004 and July 14, 2004.

INTEREST OF *AMICI*[1]

The Illinois Alcoholism and Drug Dependence Association (IADDA) is an Illinois-based not for profit established in 1967. IADDA is involved in professional training, career development and advocacy for providers in the field of alcohol and drug dependency prevention, counseling and diversion. IADDA represents more than 100 prevention and treatment agencies. A list of its members is attached in the Appendix.

IADDA advocates for sound public policy to foster healthier families and safer communities. Its objectives are to work for effective treatment for addicted or drug-dependent people and for prevention, particularly among youth. Its public policy advocacy works to promote healthier individuals and safer communities by helping avoid the problems of dependence.

IADDA partners with two prevention programs. One, Illinois Teen Institute, operates an acclaimed prevention and positive peer influence program directed at teenagers. It involves youth in community planning for prevention of addiction and dependence. Its sponsored program, Teens Reaching For And Achieving Excellence (TRAX) involves teen leaders workshops around the state to

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[1] Neither party's counsel authored any portion of this brief. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

prepare them and involve them in the anti-dependence and prevention drives. The other program, Operation Snowball, creates youth/adult partnerships to fight against use and dependence on tobacco, alcohol, and other drugs. Operation Snowball has 150 chapters working to involve communities in healthy decisionmaking.

IADDA maintains a web site linking both dependence providers and those involved in its affiliate efforts to government. http://www.iadda.org. The site facilitates access to the Illinois General Assembly, regulatory agencies, and welfare policymakers.

SUMMARY OF ARGUMENT

The Constitutional law approach to the issue of direct shipping advocated by the Sixth Circuit treats liquor like any other commodity, the untrammeled trade of which should be promoted and protected by the Commerce Clause. Such an approach is at variance with the national welfare, public opinion, and the plain language of the Twenty-First Amendment to the United States Constitution.

It is indisputable that liquor is a dangerous drug and the drug that imposes the highest social and economic costs on American society. Many authorities, including those relied upon by direct shipping advocates, recognize that states legitimately may use taxes and other regulatory measures to promote temperance and curb alcohol abuse. Particularly now with the explosive growth of Internet sales, the Sixth Circuit's approach will wreak havoc on a state's abilities to regulate and control access to this dangerous drug.

ARGUMENT

I. The Commerce Clause Has Underpinned A Strong American Economy, But Its Unfettered Application Is Not Appropriate As To Liquor

Under the Articles of Confederation that preceded the United States Constitution, import-export duties and regulations hindered the development of a national economy. *See* Adam Badawi, *Uneasy Animosities and the Public Tranquility: Political Market Failure and the Scope of the Commerce Power*, 91 Cal. L. Rev. 1331 (2003). The Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, has been a major force in creating a national free market. The Commerce Clause not only expressly conveys to Congress the power to regulate interstate trade, but has long been accepted as denying that power to state governments by negative implication. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349 (1994).

As the authorities cited by the parties in the cases now before this Court on writ of *certiorari* make clear, a notable exception to the plenary authority of Congress under the Commerce Clause is the authority -- however broad or narrow -- to regulate liquor granted to the states by Section 2 of the Twenty-First Amendment of the Constitution.

Some commentators and some decisions have found further cause or function for the negative implication of the Commerce Clause. *See, e.g.*, Douglas Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 Utah L. Rev. 111, 131 (2004). Arguing that it provides a useful tool for invalidating protectionism or special interest legislation, they contend it has been invaluable in fostering a free market in the United States and that largely because of it,

American consumers get minimum prices and optimum economic performance. By placing the interstate portion of the economy beyond the interference of much state government regulation, the Constitution has facilitated a more *laissez-faire* economic system.

The parties opposing direct shipping laws make no attempt to hide the fact that they seek to promote and protect their ability to make liquor as widely and cheaply available as possible. In their Brief in Opposition to the Petitions for Writs of Certiorari, the Respondents in the Sixth Circuit cases open and close with references to and repeatedly cite a Report by the Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine 5* (July 2003) ("Report"). In the Report the staff concludes:

> states could significantly enhance consumer welfare by allowing direct shipment of wine to consumers. Through direct shipping, online wine sales offer consumers lower prices and greater selection.

Id. at 3.

There is more to the issue before this Court than free trade, however. The fact that nearly 40 state attorneys general have added their voices in favor of alcohol regulation and against open shipping testifies to that.

The American public does not believe that minimum pricing and maximum consumption is desirable for all commodities and all industries. Congress in some cases has responded to that public concern by banning or tightly regulating the commodity with Commerce Clause authority. Heroin is an example. *See* 21 U.S.C. § 841.

Alcohol is an even better example. Congress twice has placed before the states constitutional amendments to

regulate alcohol as an alternative to exclusive Commerce Clause regulation. Both were ratified by the states and both dealt with alcohol. The Eighteenth Amendment introduced Prohibition and banned alcohol. The Twenty-First Amendment repealed Prohibition and granted regulatory authority to the states over the transportation or importation of alcohol.

Courts have recognized the power of states to ban alcohol totally, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000), to permit political subdivisions to ban it, *Allstate Beer, Inc. v. Julius Wile Sons & Co., Inc.*, 479 F. Supp. 605 (N.D. Ga. 1979), and to ban it at specific times or in particular places. *Levendis v. Cobb County*, 250 S.E.2d 460, 242 Ga. 592 (Ga. 1979); *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurant, Inc.*, 669 P.2d 265, 1983 Ok. 77 (Ok. 1983).

Most Americans do not want to maximize the availability and consumption of alcohol by minimizing price. In a 2003 national poll by Wirthlin Worldwide, 83% of respondents agreed that Internet sales should not be allowed because they would give minors easier access to alcohol. *New Survey Confirms Majority of Americans Oppose Internet Alcohol Sales*, Oct. 22, 2003, *at* http://www.cheaphostingdirectory.com/news/20031022alcohol. (citing a 2003 WirthlinWorldwide survey). 77% of Americans oppose permitting direct sales of alcohol by Internet or mail, as do 71% of self-identified alcohol consumers, and 85% of non-drinkers. *Id.* In Texas during 2000, a poll found that 71% disagreed with the statement: "Manufactures of any product including alcoholic beverages, should have the right to sell directly to consumers over the Internet." *The Three-Tier System: Texans Overwhelmingly Reject Direct Shipment of Alcohol* (2000), *at* http://www.texassafetynetwork.org/internet/three/survey.htm

(citing a statewide public opinion poll). In Chicago, Illinois, 24 partial and 16 full precincts have voted to go "dry" since 1992. Mayor Richard Daley has noted that a "bad liquor establishment can tear the fabric of a neighborhood and send it into decline." Chicago Magazine, *The Dry Season*, July 2003.

As the foregoing illustrates, prudent use is a more favored social objective than wide-open access where liquor is concerned. This should be recognized in evaluating the competing schemes of legal analysis for state regulation of alcohol.

The Report acknowledges that "some states may explicitly pursue a policy of elevating prices above competitive levels to promote temperance." *Id.* at 26-27. In fact, the National Academy of Sciences has recommended that "Congress and state legislatures should raise excise taxes to reduce underage consumption ..." Report of the National Academy of Sciences, *Reducing Underage Drinking: A Collective Responsibility* at 11 (September 2003) *at* http://www.marininstitute.org/alcohol_policy/UnderageDrinking_Exec_Summary.

A 2002 article summarizing the economic research on the effect of price on alcohol consumption found that:

> This research, which has used a wide variety of data, generally has concluded that increases in the price of alcoholic beverages lead to reductions in drinking and heavy drinking as well as in the consequences of alcohol use and abuse.

Frank J. Chaloupka *et al.*, *The Effects Of Price On Alcohol Consumption and Alcohol-Related Problems*, 26 Nat'l. Acad.

Sci. 1, 22 (2003). One of the studies commended in the review found:

> After controlling for State and year effects, the investigators concluded that a $1 increase in the per gallon liquor tax can reduce gonorrhea rates by 2.1 percent; furthermore a beer tax increase of 20 cents per six-pack can reduce gonorrhea rates by 8.9 percent. Similar, or even somewhat larger, effects of liquor and beer taxes were found for syphilis rates.

See id. at 30.

II. Alcohol Is Responsible For More Social And Economic Damage To The American Public Than All Other Drugs Combined.

Statistics on violence, divorce, crime, fetal alcohol syndrome, spousal and child abuse, DUI killings and maimings, and lost work time clearly demonstrate the terrible social and economic cost our society pays for the imprudent use of alcohol.

The economic cost of liquor abuse in America is estimated at $185 billion, while that for illicit drugs is estimated at $161 billion. Underage drinkers and adult excessive drinkers account for an aggregate 50.1% of total alcohol consumption in the United States. Glen R. Hanson & Ting-Kai Li, *Public Health Implications of Excessive Alcohol Consumption*, 289 JAMA 8, 1031 (Feb. 26, 2003). Approximately one-third of U.S. adults exceed the guidelines defining excessive consumption. *Id.* at 1032. A recent Illinois state government survey found that 10% of eighth graders and 36% of twelfth graders reported binge drinking. Press Release, *Governor Blagojevich Calls for More Federal Funding to Prevent the Dangers of Binge Drinking: Study Shows Heavy Drinking Isn't Just on College Campuses*

(April 7, 2004). The Report that the direct shipping advocates repeatedly cite confirms what should be sobering statistics on youth access to alcohol:

> In 2002 approximately 68% of eighth graders, 85% of tenth graders, and 95% of twelfth graders said that it is "fairly easy" or "very easy" to get alcohol. Underage alcohol use imposes significant costs, in both human terms and economic terms. Although the numbers are very difficult to quantify, one study estimated that, in 1996, the total cost of underage drinking—including traffic crashes, violent crimes, burns, drowning, suicide attempts, fetal alcohol syndrome, alcohol poisoning, and treatment—was $52.8 billion.

Id. at 11.

Those numbers are significant for many reasons. Alcohol is associated with violence. The National Institute on Alcohol Abuse and Alcoholism (NIAA) has found that:

> Excessive alcohol consumption is frequently a factor in violence toward women. These events range from being the recipient of verbal aggression . . . to battery, rape, and death. Recent findings among women who reported sexual assaults include higher levels of alcohol consumption, both their own and the perpetrators, and sexual risk-taking.

NIAA, *Strategic Plan 2001-2005* at 20 *at* http://www.niaa.nih.gov. 50-60 % of male alcoholics report violent behavior toward women. *Id.*

Further, "[a]lcohol abuse is associated with high-risk sexual behavior and injection drug use, two of the major modes of human immunodeficiency virus transmission."

Hanson & Li, *supra*, at 1031. *The Christian Science Monitor* noted in a report on underage drinking that:

> experts say (sex) . . . is a factor advertisers exploit, often to the detriment of girls more than boys. 'Bad girls make good company,' reads one ad for Cuervo rum. In a Martell Cognac ad, a sultry woman is on display with a plea to 'be at least capable of bad.'

New Face of Underage Drinking: Teenage Girls, Christian Science Monitor, July 13, 2004.

The adverse impact of alcohol on the young is well-established. Drinking increases "the chances that teenagers will become adult heavier drinkers with alcohol problems later in life". Susan E. Foster, et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289 JAMA 8, 989 (Feb. 26, 2003); B.F. Grant & D.A. Dawson, *Age of Onset of Alcohol Use and its Association with DSM-IV Alcohol Abuse and Dependence: Results from the National Longitudinal Alcohol Epidemiological Survey*, J. SUBSTANCE ABUSE, 9, 103-110 (1997). Prenatal contact with alcohol is highly detrimental: "We found more serious cognitive impairment in relation to alcohol than cocaine or other drugs, including marijuana or smoking" (Dr. Sandra Jacobson, Wayne State University). Linda Carroll, *Fetal Brains Suffer Badly from Effects of Alcohol*, N.Y. Times, Nov. 4, 2003, available at http://www.nytimes.com/. "Fetal alcohol syndrome, a serious disorder affecting brain function, is the leading preventable birth defect in the U.S." *Id.*

III. Illinois' Liquor Law Is Designed To Regulate Imported Liquor

Illinois is home to many large liquor retailers, such as Sam's Wine & Spirits, Binny's, and Walgreen's. Illinois, however, has relatively few wineries and distilleries and no major breweries, so a very high percentage of the alcohol sold is imported. Illinois law looks to and derives its authority from the Twenty-First Amendment. For example, the direct shipping provision of the Illinois Liquor Control Act of 1934 provides:

> Pursuant to the Twenty-First Amendment of the United States Constitution allowing states to regulate the distribution and sale of alcoholic liquor and pursuant to the federal Webb-Kenyon Act declaring that alcoholic liquor shipped in interstate commerce must comply with state laws, the General Assembly hereby finds and declares that selling alcoholic liquor from a point outside this State through various direct marketing means, such as catalogs, newspapers, mailers and the Internet, directly to residents of this State poses a serious threat to the State's efforts to prevent youths from accessing alcoholic liquor; to State revenue collections; and to the economy of this State.

235 Ill. Comp. Stat. 5/6-29.1 (1934). *See also* Illinois Beer Industry Fair Dealing Act, 815 Ill. Comp. Stat. 720/2 ("This Act is promulgated pursuant to authority of the State under the provisions of the Twenty-First Amendment to the United States Constitution ..."); *Erfor Corp. v. State of Illinois Liquor Control Commission*, 47 Ill. App. 3d 72, 361 N.E.2d 776 (Ill. App. Ct. 1977) ("The source of state power to control alcoholic beverages is the police power as fortified by the twenty-first amendment of the United States Constitution.")

In Illinois, retailers must determine age eligibility, observe operating hours, halt bawdy conduct and gambling, prevent disorderly conduct, and must not intoxicate patrons. 235 Ill. Comp. Stat. 5/6-16; *Spiros Lounge, Inc. v. State of Illinois Liquor Control Commission*, 423 N.E.2d 1366, 1372, 98 Ill. App. 3d 280, 287 (Ill. App. Ct. 1981) (sales to minor justified revocation); *Jager v. Illinois Liquor Control Commission*, 392 N.E.2d 176, 182, 74 Ill. App. 3d 33 (Ill. App. Ct. 1979), (repeated altercations as grounds for revocation); *Show of Shows, Inc. v. Illinois Liquor Control Commission*, 230 N.E.2d 268, 271, 86 Ill. App. 2d 109 (Ill. App. Ct. 1967) (solicitation of drinks by female employee warranted revocation); *Daley v. Jack's Tivoli Liquor Lounge*, 254 N.E.2d 814, 819, 118 Ill. App. 2d 264 (Ill. App. Ct. 1969) (sexual solicitation of police officer by prostitute vouched for by bartender warranted revocation); *Daley v. Rifkin*, 228 N.E.2d 224, 226, 84 Ill. App. 2d 467 (Ill. App. Ct. 1967) (evidence that bartender steered patron to prostitute justified revocation).

An Illinois importing distributor must be licensed as a distributor. 235 Ill. Comp. Stat. 5/5-1(c). An importing distributor must hold received alcohol in his warehouse from receipt until delivery to a retailer. 235 Ill. Comp. Stat. 5/6-8. A tax measured by volume is imposed on importing distributors and must be paid within 15 days of the month following delivery to a retailer. 235 Ill. Comp. Stat. 5/8-1; 235 Ill. Comp. Stat. 5/8-2. A distributor may only deliver to a licensed retailer. 235 Ill. Comp. Stat. 5/1-1(b).

Common carriers delivering alcohol into Illinois are required to file shipment manifests with the Illinois Liquor Control Commission. 235 Ill. Comp. Stat. 5/8-12. Consequently, reconciliation of the manifest information with the distributor tax filing and the warehouse inventory creates a fail-safe system for tax collection. If manifested product is

not in the inventory, it has been delivered and tax is due. 235 Ill. Comp. Stat. 5/8-2. Further, the tax document verifies that the distributor is only selling to retailers, not consumers, because the retailer must remit the sales tax to the state, accounting for the product. 235 Ill. Comp. Stat. 5/8-14. This distribution system means that sales to consumers go through licensed retailers and, as set forth above, Illinois polices retailers by inventory control to assure that taxes are paid and that sales are not made to minors or in furtherance of undesirable conduct.

Illinois permits some limited direct shipment to Illinois consumers, 235 Ill. Comp. Stat. 5/6-29, while maintaining a general prohibition. 235 Ill. Comp. Stat. 5/6-29.1. Retail inventory control is a regulatory scheme which serves to limit youth access.

IV. This Case Will Have A Substantial Impact On The Ability Of Illinois And Other States To Maintain Control Of Imported Alcohol

This Court now has before it decisions by the Second Circuit and the Sixth Circuit Courts of Appeals that take radically different views of the authority to regulate the importation of intoxicating liquor granted to the states by the Twenty-First Amendment and of the interplay between the Twenty-First Amendment and the dormant Commerce Clause. The very basis of their analyses differs.

The Second Circuit essentially looks at the scope of authority granted by the Twenty-First Amendment and allows states to regulate the importation of liquor in any rational fashion within that scope.

The Sixth Circuit, however, employs a two-step approach, starting with a dormant Commerce Clause analysis

and, if the state statute fails to pass a "strict scrutiny" test, proceeding on to determine whether the statute is somehow "saved" by the Twenty-First Amendment.

The Sixth Circuit approach effectively reduces the Twenty-First Amendment to surplusage and prevents a state from regulating alcohol in a fashion any stricter than it may regulate other goods in interstate commerce.

Consider:

- An out of state Internet seller with no physical presence in Illinois sells directly to an Illinois liquor retailer. Under the current law requiring physical presence to establish Commerce Clause nexus with a taxing state, the State of Illinois has no ability to impose a sales or use tax on the seller. *See Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904 (1992); *National Bellas-Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389 (1967). The state loses not only revenue, but the ability to use high taxes to depress consumption. Furthermore, the state must deploy more resources or divert existing resources to ensure that only licensees are selling, and selling within the limits of the law.
- Under Illinois law, a distributor must operate a strictly controlled warehouse. The inventory can be ascertained by the deliveries made and reported from the common carrier delivery manifests. The distributor pays a tax when product at the warehouse is delivered to a licensed retailer. However, if an Illinois distributor were to purchase product over the Internet and have it delivered directly to the retailer, tracking, regulating and taxing the product would become infinitely more difficult for the State. An untraceable, unidentified supply of liquor will

encourage failure to pay tax and lower prices, making liquor more accessible to minors.

According to a July 2004 report released by the National Governor's Association and the National Conference of State Legislators, sales over the Internet topped $104 billion in 2003, a nearly 40% jump over the previous year. *See* Forrester Research, Inc., *The Growth Of Multichannel Retailing*. The volume of sales over the Internet has grown exponentially in the years since this Court last interpreted the Twenty-First Amendment. There is no reason to think that growth will not continue.

This is undoubtedly true with respect to alcohol sales to minors, as well. A 2000 poll by Americans for Responsible Alcohol Awareness found 80% of college students say their peers are likely to purchase alcohol over the Internet, as no age verification is required. *National Survey: 80% of College Students Say Peers Likely to Purchase Alcohol Online* (April 4, 2000) *at* http://www.texassafetynetwork.org/news/reporter/eightypercent. Volume alone will render it increasingly hard for state's to prevent and police such sales.

V. The *Swedenburg* Analysis Facilitates State Efforts To Control Improper Alcohol Use

The Second Circuit's approach in *Swedenburg* requires state liquor control schemes to be rational exercises of power pursuant to the purpose of the Twenty-First Amendment. It necessarily looks to a state's regulatory structure to find meaning for any particular component subject to challenge.

The Sixth Circuit's logic in *Granholm* starts by treating liquor the same as if it were any other commodity,

like autos, milk, or furniture. If it finds discriminatory treatment of out-of-state-sourced liquor, it defaults to Commerce Clause strict scrutiny.

The Sixth Circuit approach is inconsistent with the language of the Twenty-First Amendment prohibiting importation in violation of the state's laws and ignores the overwhelming medical and economic evidence that liquor is the dangerous drug most affecting American society. Furthermore, it flies in the face of the explosive development of a new distribution technology that threatens to swamp efforts at liquor regulation, the Internet.

Illinois predicates its liquor tax collection system on distributor collection and payment. The Internet can go around it. Under the Sixth Circuit approach, perhaps Illinois could find a way to collect the tax from out-of-state sources. But it would succeed only if *Quill* does not apply, if Congress permits, if presence is not required, and if the Internet shipper can actually be found. It makes a high tax/lower consumption strategy for liquor control virtually a dead letter.

Collection from in-state sources will be more difficult if not impossible. A state cannot police its sales tax collections if Internet delivery to retailers becomes physically possible. The suggestion that the state do more physical audits comparing inventory to sales tax remissions and distributor delivery reports is unrealistic. Illinois has 25,000 retail liquor licensees. Constant physical surveillance of retail sites is not a feasible enforcement option. Physical surveillance of cyberspace is virtually impossible.

If a state predicates underage distribution control on retail carding to determine eligibility, it still may be able to impact diversion to minors if direct shippers are physically

present in the state because the state has much more intimate supervision of how the shippers conduct business. Internet sites can open and close in a click.

Currently, the circuits are split on direct sales of liquor. An Internet industry in liquor looms. Illinois, like other states, has a system that uses inventory controls to tax and monitor retail sales. Undermining the tools of control will not help. Imposing Commerce Clause strict scrutiny for a test of Twenty-First Amendment rational purpose will promote uncontrolled, unregulated liquor sales. If states can effectively regulate the development of this industry, the political branches of government may devise a strategy for dealing with this dangerous product.

CONCLUSION

The judgment of the Second Circuit Court of Appeals in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) should be affirmed and the judgment of the Sixth Circuit Court of Appeals in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) reversed.

Dated: July 29, 2004

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APPENDIX

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Sojourn House, Inc.
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REGION 2

Resolve Center
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REGION 3

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